

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD WATKINS TAPPIN, II,

1:05-cv-00190-OWW-TAG-HC

Petitioner,

vs.

REPORT AND RECOMMENDATION
TO DISMISS PETITION

U.S. DISTRICT COURT, et al.,

(Doc. 1)

Respondent.

Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On August 24, 2005, the Court issued an order requiring Petitioner to file an amended petition for writ of habeas corpus within thirty days from the date of service of that order. (Doc. 15). The order was re-served on October 6, 2005. (Doc. 18). More than two months later, on December 12, 2005, concerned that Petitioner's change of address may have contributed to his failure to respond, the Court issued a second order for Petitioner to file an amended petition. (Doc. 19). Petitioner was required to comply within twenty days of the date of service of that order. As of this date, Petitioner has failed to respond in any fashion to the Court's prior orders.

In determining whether to dismiss an action for lack of prosecution, the Court must consider several factors: (1) the public's interest in expeditious resolution of litigation; (2) the Court's need to manage its docket; (3) the risk of prejudice to the Respondents; (4) the public policy favoring disposition of cases on their merits; and, (5) the availability of less drastic alternatives. Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986); Carey v. King, 856 F.2d 1439 (9th Cir. 1988). The Court finds that the public's interest in expeditiously resolving this litigation and the Court's interest in managing the docket weigh in favor of dismissal, as this case has been pending

1 since February 3, 2005. The third factor, risk of prejudice to Respondents, also weighs in favor of
2 dismissal, since a presumption of injury arises from the occurrence of unreasonable delay in
3 prosecuting an action. Anderson v. Air West, 542 F.2d 522, 524 (9th Cir. 1976). The fourth factor --
4 public policy favoring disposition of cases on their merits -- is greatly outweighed by the factors in
5 favor of dismissal discussed herein. Finally, a court's warning to a party that failure to obey the
6 court's order will result in dismissal satisfies the "consideration of alternatives" requirement. Ferdik
7 v. Bonzelet, 963 F.2d at 1262; Malone, 833 at 132-33; Henderson, 779 F.2d at 1424. The Court's
8 order of December 12, 2005, expressly stated: "Petitioner is forewarned that his failure to comply
9 with this order will result in a Recommendation that the Petition be dismissed...." (Doc. 19, p. 2).
10 Thus, Petitioner had adequate warning that dismissal would result from his noncompliance with the
11 Court's order.

12 Accordingly, the Court HEREBY RECOMMENDS that this action be DISMISSED
13 for Petitioner's failure to prosecute and failure to follow an order of the Court. This Report and
14 Recommendation is submitted to the United States District Court Judge assigned to the case pursuant
15 to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 72-304 of the Local Rules of Practice for the
16 United States District Court, Eastern District of California. Within thirty (30) days after being
17 served with a copy, any party may file written objections with the court and serve a copy on all
18 parties. Such a document should be captioned "Objections to Magistrate Judge's Report and
19 Recommendation." Replies to the objections shall be served and filed within ten (10) court days
20 (plus three days if served by mail) after service of the objections. The Court will then review the
21 Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure
22 to file objections within the specified time may waive the right to appeal the District Court's order.
23 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

24
25 IT IS SO ORDERED.

26 Dated: July 18, 2006
27 j6eb3d

/s/ Theresa A. Goldner
UNITED STATES MAGISTRATE JUDGE